APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH COURT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Florida

(March 11, 1965)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

TUTTLE, Chief Judge: This is an appeal by ten co-defendants from their convictions in a jury trial for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. Sec. 17 (q)(a), and the Mail Fraud Statute 18 U.S.C.A. Section 1341, and conspiring to violate those laws, 18 U.S.C.A. Section 371. The indictment charged a scheme under which the defendants sold to the public notes of Credit Finance Corporation, which were to return 12%, and later 8%, interest. This interest was stated to be produced by C.F.C.'s income from automobile loans and real estate transactions. The alleged scheme was that, rather than carrying out the income generating plan represented to the investors, the principals behind C.F.C. were to, and did, divert investors' funds to themselves for their personal use.

Of the ten defendants, Norman Gradsky, Robert Grene, and Leonard Glaser, do not challenge the sufficiency of

the evidence against them. We conclude that there is no substantial issue as to whether there was sufficient evidence to sustain a verdict of guilt as to Mrs. B. J. Gradsky, the wife of Norman Gradsky, and George Levine, who took control of the company in July, 1960. There remain questions as to the sufficiency of the evidence to warrant submission of the cases of the other five defendants to the jury and a number of alleged errors in rulings by the trial court which will be dealt with below.

Gertrude Hogue has abandoned all contentions on this appeal except that there was not sufficient evidence to tie her in to the scheme or the false representations to warrant the trial court's submission of her case to the jury. She makes an appealing case because, although she was named as a vice president, it is apparent that she profited from the operation only to the extent of receiving a modest salary with a small bonus. However, we are compelled to conclude that such appeal as she could make on these grounds were properly addressed to the jury, and may still be addressed to the trial court in a motion to reduce sentence under Rule 35, F.R.Cr.P. We conclude that it can not prevail here in light of the clear evidence in the record that would warrant a jury's finding that Mrs. Hogue herself sold notes of the fraudulent company and in so doing repeatedly misrepresented the nature and financial condition of the organization. There is evidence from which the jury could determine that she knew her representations were false and that in submitting for inspection copies of the company's financial statement, she was lending her aid to the fraud.

Appellants Gibbons, Schiff, Roberts and Meadors were all salesmen for C.F.C., and all made misrepresentations about the nature and financial condition of the company to investors. The question of sufficiency of the evidence as to these parties turns on their knowledge that their statements were untrue. Gibbons worked for the company for only two months. However, during that time he

was its treasurer and served as an auditor. Schiff was in C.F.C.'s employ longer than Gibbons. Among his false statements to investors was the statement that C.F.C. was insured under federal and state laws. Roberts was a vice president of C.F.C.; he too represented that C.F.C.'s interest rate was insured. Meadors was also a C.F.C. vice president and was manager of its Orlando office; he also misrepresented the nature of the Florida regulation of C.F.C. and he falsely told an investor that he had his own money in the company. While it was not shown that any of these four persons diverted any of the company's money to their own use, other than the compensation they drew as salesmen, the jury was authorized to find that when they represented the facts concerning the company's position which turned out to be false, their relationship with the company was such that they actually knew of the falsity of the misrepresentations. *Peel* v. *U.S.*, 5 Cir., 316 F. 2nd 907.

The Court concludes, therefore, that there was sufficient evidence as to each of the appellants to permit the jury to determine whether they were guilty of some of the offenses as charged beyond a reasonable doubt.

Most of the appellants make their strongest claim of error here on language in the charge of the trial court, which they say amounted to comment by the trial court on the defendants' failure to take the witness stand. The challenged instruction, to which no objection was made on the trial, as follows:

> "Now then it is my duty to tell you that the indictment that I mentioned in the case there is no evidence whatever . . . It has no probative force. When I say probative force I mean proof.
>
> "The only testimony you will consider will be the testimony from the lips of witnesses given under the supervision of the Court or by documentary proof and no other.

"The indictment is a mere formal charge. The Grand Jury heard only one side. The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it . . . They should be put up on their trial . . . and unless they answered they should be convicted.

"And so that is not testimony as having any probative force whatsoever."

Appellants rely on *Perez* v. *United States*, 5 Cir., 1961, 297 F. 2nd. 12, in support of their contention that this charge amounted to prejudicial error. The *Perez* case is not apposite here. There, the government relied upon the presumption statute, 21 U.S.C.A. Sec. 176 (a),[1] which in effect provided a statutory presumption of guilt of possession of marijuana absent an explanation by the defendant. In that case the trial court had properly charged the jury on the burden of proof and the presumption of innocence, but the jury returned to the court room and requested that the relevant parts of the Code be read to it. The court read the section referred to above, whereupon *both government counsel and defense counsel* requested that the court add that such explanation could come through other witnesses and that the defendants were not themselves required to take the stand. The judge refused to charge in that respect, and we reversed on the ground that this was prejudicial error.

The situation is quite different here. In the first place, the reference to what the Grand Jury thought is really innocuous; it was part of the judge's effort to tell the jury that the fact that the Grand Jury had made the charge and thought that the defendants were guilty unless they came up with some answer to the charge, was

[1] This statute provides in part as follows: "Whenever on trial for a violation of this subsection, the defendant is shown to have had or to have had the marijuana in his possession, shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

really not to be considered by the jury as having any probative force whatever. In point of fact the defendants did make an answer to the indictment when they entered their pleas of not guilty. There was nothing in the charge that indicated there was an obligation on the defendants to take the witness stand themselves. If there had been any such implication, it was completely answered by the subsequent charge of the Court expressly stating:

> "The law is such that a defendant . . . an accused person in the federal court is not required to take the witness stand. He doesn't have to do anything. So that the very fact that there is no testimony on the part of the defendants would not justify it in drawing any adverse inferences.
>
> "On the contrary, they were within their rights in not testifying in the case.
>
> "So you will give no consideration whatever to the fact that the defendants, or any of them, did not testify in the case."

In the *Perez* case we stated that when the trial court charged the presumption statute, it was incumbent on the trial court to reiterate or call again to the jurors a charge such as was actually given in this case. We conclude that there is no merit in the contention that the trial court or government counsel in any way prejudiced the defendants' rights by any reference to defendants' failure to testify on their own behalf.

The second important criticism that is made of the trial court's conduct of the trial devolves upon the absence from the courtroom during the trial of records of a company called Security Guaranty Corporation, the corporation to which Mrs. B. J. Gradsky transferred all the stock of C.F.C. in April, 1960. It is plain that these records were available in the government's possession in Orlando, the place of the trial, for most of the period of the trial, but they were later taken elsewhere by a postal inspector for proper use by the United States. It

is not clear from the record presented to us whether counsel for any of the defendants specifically moved for the production of these records and that such motion was pressed to a conclusion before the trial court.[2]

In any event, it is not shown that the absence of these records in any way prejudiced the appellants. The government expert, the accountant Callahan, whose summaries and charts of C.F.C.'s finances were among the government's most telling evidence, stated that he did not rely on records of S.G.C. in making his summaries.

It is not disputed that the records of C.F.C. were in court and available to the appellants for inspection and for purposes of cross-examination. We think under the circumstances, the case of *United States* v. *Consolidated Laundries Corp.*, 2 Cir., 1961, 291 F. 2d 563, does, therefore, not support the appellants' contention in this regard. The summaries were, of course, admissible. See *Greenhill* v. *United States*, 5 Cir., 298 F. 2d 405, cert. denied, 371 U.S. 830, (1962).

A further charge of error relates to the refusal of the trial court to grant an extra peremptory challenge in light of the responses made by one juror, a Mrs. Lewis. Upon *voir dire*, this lady who had never before been a juror, indicated, in response to a question by counsel, that she thought both sides should come forward with evidence. However, when counsel called her attention to the fact that the defendants do not have to "say a single word in this case," Mrs. Lewis said, "Oh! I see." She was then asked by counsel, "You understand that the burden is upon the government to establish their case?" And she answered, "Oh. Yes, I see what you mean." Responding to a question by counsel, "Then it is your view that both sides should come forward with

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[2] It is clear that the motion referred to by counsel in their brief did not contain a motion for production of these records. We have been unable to find any other.

evidence in this criminal case?" She answered, "Well, I thought that was the procedure. I never served." She further answered the question, "Do you have a firm conviction in your mind that my client, Mr. Meadors, should come forward with the evidence in this case if he is on trial?" She answered, "I think so." Thereupon the court interposed and stated, "She doesn't know about those things."

If these were proper questions by counsel to be asked on a *voir dire,* which was seriously doubt, all that was elicited from this prospective juror was that she did not know the rules of law as to which the trial court would later charge the jury. Counsel's effort to educate her as to the right to remain mute apparently had not quite succeeded at the time when counsel then made a motion for sustaining a peremptory challenge. There is no indication that Mrs. Lewis did not fully understand and follow the trial court's subsequent instruction when the time for instructing her on the law occurred.

We conclude that there is no merit in the contention that this juror's lack of knowledge as to the presumption of innocence and right not to testify before the trial started required the granting of additional peremptory challenges. Moreover, there appearing to be no evidence of conflicts of interest among the defendants, we can not hold that there was an abuse of discretion by the trial court in not exceeding the ten peremptory challenge rule of Rule 24(b) Federal Rules of Criminal Procedure.

Appellants argued that a proper foundation was not laid for the admission of C.F.C.'s books under the Federal Shop Book Rule, 28 U.S.C.A. Sec. 1732. While authentication of each entry and identification of the persons making them was not presented, there was testimony by various employees of the corporation that the entries and records in question were made in the ordinary course of C.F.C. business. The requirements of this statute which was

designed to facilitate proof of business records seem to have been fully met here. The criticisms were such as could be argued as to the weight of the evidence rather than to its admissibility. See *Carroll* v. *United States*, 9 Cir., 1963 326 F. 2d 72, and *Taylor* v. *United States*, 5 Cir., 96 F. 2d 16.

This case required five weeks to try. As indicated, there were ten defendants. There were ten counts to the indictment. It is inevitable in such a situation that each of the defendants, when he has been convicted by the jury, seeks, on appeal, to work a reversal on the theory that a particular bit of evidence introduced on the trial, directly implicating another defendant, made no mention of the one now complaining. Typical of this is the contention made by so many of the appellants that they ought not be bound by the falsity of the books since they had nothing to do with keeping the books. Appellant Roberts, for instance, says, "Yet the evidence was undisputed that Roberts made no entries therein or had any connection or knowledge thereof. The law is well establshed that such books and records are admissible only against corporate offices with access and control thereof who dominated and controlled the company, or if they made or supervised the entries therein. Such books and records do not constitute competent evidence against one merely because he is connected with a company."

Certainly it is the law that such books and records do not constitute competent evidence against one *merely because he is connected with the company*, but such was not the situation of Roberts. In the first place he was a vice president of the company; in the second place, he stated to victims that the funds loaned by the victims were "insured" and he told victims that the company owned a large shopping center, which was making lots of money; he also said the company's funds were invested in automobile paper and real estate, and "just about everything that you could lay money on." When a par-

ticipant undertakes to persuade an investor to turn his money over to him, as Roberts did, and in order to make the deal makes false statements touching on the assets of the corporation, and is, thus, making a representation concerning what is shown by the books, the jury is free to draw the inference that he is as responsible for the books and records of the company as if he had made the entries therein.

This illustration is merely one of many contentions made by appellants here in which a complete misconception of the responsibility which an individual has towards the entire operation once he is found by the jury to be a participant in the scheme.

We have carefully considered each of the assignments of error, consisting largely of alleged errors in the giving or refusing to give proper elements of the charge and the admission of evidence against individual defendants and find that most of them are based upon this lack of appreciation of the degree to which a jury may infer participation on the scheme, participation in the conspiracy, and responsibility for the acts of joint conspirators. We conclude that the appellants had a fair trial. They were represented by able counsel. The fact that the scheme and conspiracy, found by the jury to have been set up to prey on the investing public was a complex and involved one, can not be permitted of itself to frustrate a trial where any slight errors or inconsistencies that may creep in are, as we find them to be here, without prejudice to the accused persons. See *Greenhill* v. *United States*, 5 Cir., 298 F. 2d 405.

We have stated above that there was ample evidence to submit to the jury the question of guilt of the appellants Gibbons, Schiff, Roberts and Meadors as to some of the charges. We have, however, carefully read the testimony with respect to these defendants and conclude that as to each of them whose appeals are still pending

here, Gibbons, Schiff, and Roberts,[3] their tenure with the company and thus their involvement in the fraudulent scheme was so short in point of time and the number of representations actually by them made were so restricted that we conclude since, too, they had no proprietary interest in these businesses, there was not sufficient evidence to warrant the jury's finding guilt beyond a reasonable doubt as to those counts which charged them with having participated in substantive crimes at a time when they were not actually employed by C.F.C.

The record is clear that Schiff was an employee of C.F.C. no longer that from the latter part of July, 1960, to the end of September of that year. We, therefore, conclude that his conviction of counts one, three, four, five, six and seven must be set aside. Roberts was a part-time employee of C.F.C. between August, 1959, and April, 1960. We conclude, therefore, that his conviction on counts one, two, four, five, seven and nine must be set side. Gibbons was an employee of the company for approximately two months—from the end of December, 1959, to the end of February, 1960. His conviction on counts one, two, three, four, five, seven, eight and nine are, therefore, vacated and set aside.

We fully recognize the principle asserted by this Court in *Sherwood* v. *United States*, 5 Cir., 300 F. 2d 603, that all who, with criminal intent, join themselves even slightly to the principal scheme, are subject to the statute. See *Kaplan* v. *United States*, 2 Cir., 18 F. 2d 939, but with respect to the substantive counts here charged there must be sufficient evidence of the intent of the separate defendants to participate in the scheme, and the acts done

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[3] Meadors' appeal was dismissed for want of prosecution. We think it not inappropriate, however, to suggest that the relief afforded to the other three short-time employees of C.F.C. may be considered by the trial court upon the presentation by Meadors of a proper motion to reduce sentence under Rule 35.

in furtherance thereof, to warrant submission of the separate charges to the jury.

Here, we find insufficient evidence to warrant the submission of the charges against the three named appellants which we have now determined should be vacated.

The judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons. The judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten. The sentences against Roberts on counts one, two, four, five, seven and nine are set aside.

The judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten. The sentences against Schiff on counts one, three, four, five, six and seven are set aside.

The judgment against Gibbons is affirmed as to the sentences on counts six and ten. The sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside.

The case is remanded for further proceeding not inconsistent with this opinion and judgment.

APPENDIX B

COURT RULE

Rule 32

Issuance of Mandate

Date of Issuance: The mandate of the court shall issue after twenty-one days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the

court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

A mandate once issued will not be recalled except by the court and to prevent injustice.

Adopted May 31st, 1963.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Petition for Re-Hearing

On March 11, 1965, this Court affirmed the Judgment of the Trial Court herein. The jurisdiction of this Court is invoked pursuant to Rule 29 of the rules of this Court.

As To All Appellants:

1. The Court misconstrued the record as to the availability of the records of SECURITY GUARANTY CORPORATION, in that the Court stated:

> "It is plain that these records were available in the government's possession in Orlando, the place of trial, for most of the the period of the trial—"

The record reflects that trial counsel for the appellant, ROBERT GRENE, examined these records one week prior to trial, and on the day the trial commenced the records had been removed. The Court's statement that there was no showing that the absence of the records prejudiced the appellants is without foundation in that the charts prepared by CALLAHAN (government's exhibits 238-238E) were in part based upon SECURITY GUARANTY CORPORATION.

In addition to the foregoing, the company whose records were secreted, was even named in part of the indictment.

2. The Court failed to consider the Trial Court's and prosecutor's comments about trial counsel.

3. The Court failed to consider the Court's improper use of the charts (government's exhibits 238-238E).

As To The Appellant, ROBERT GRENE:

1. The Court failed to consider the denial of his motion for a continuance because Court-appointed counsel was unfamiliar with the cause.

As To The Appellant, B. J. GRADSKY:

1. That although she received some of the financial benefits of the operation of CREDIT FINANCE CORPORATION, the record lacks any evidence, by inference or otherwise, that she in any way knowingly participated in a scheme or conspiracy to defraud; that by the Securities and Exchange Commission's own admission, the extent of her participation in the activities of the company was to sign documents, probably at the request of her husband.

Conclusion

It is respectfully submitted that this Petition for Rehearing should be granted.

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Certificate of Good Faith

I, the undersigned counsel, respectfully certify to this Honorable Court that the foregoing Petition for Re-Hearing is presented in good faith and not for the purpose of delay.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

Norman Gradsky, et al, *Appellants,*

v.

United States of America, *Appellee.*

Appeal From The United States District Court
For The Southern District of Florida

Brief of Appellants Norman Gradsky, B. J. Gradsky and Robert Grene

Statement of the Case

The appellants hereby adopt and incorporate as their own the Introductory Statement and Statement of the

Case, as contained in the brief filed on behalf of the appellant, ROBERT B. ROBERTS (BR pages 1 through 10).

SPECIFICATION OF ERRORS

I.

The Court Erred In Refusing To Excuse Mrs. Lewis As A Judor For Cause And In Refusing To Grant Defendants' Additional Peremptory Challenges.

II.

The Court Erred In Sending A Copy Of The Indictment To The Jury Without Instructing That The Unproven Charges In The Indictment Had Been Withdrawn From The Case, And Sending Other Exhibits To The Jury That Had Not Been Requested.

III.

The Court Erred In Charging The Jury And In Refusing To Charge The Jury As Requested By Defense Counsel.

IV.

Errors Committed By The Court During The Course Of The Trial.

V.

The Court Erred In Denying B. J. Gradsky's Motion For Judgment Of Acquittal.

VI.

It Was Abuse Of Discretion To Deny A Continuance To The Appellant, ROBERT GRENE.

Argument

I.

The Court Erred In Refusing To Excuse Mrs. Lewis As A Juror For Cause And In Refusing To Grant Defendants' Additional Peremptory Challenges.

The appellants hereby adopt as their own the brief of Robert B. Roberts (BR pages 12 and 13) as argument under this Specification of Error.

II.

The Court Erred In Sending A Copy Of The Indictment To The Jury Without Instructing That The Unproven Charges In The Indictment Had Been Withdrawn From The Case, And Sending Other Exhibits To The Jury That Had Not Been Requested.

The appellants hereby adopt as their own that portion of Robert B. Roberts' brief relating to the submission of the Indictment to the Jury without proper limiting instructions (BR pages 15 through 19).

The Jury requested some additional documents. It is apparent from the colloquy between the Court and counsel that requests were subject to interpretation. (R Volume 22, pages 4356 through 4369). Counsel for the defense and the prosecution disagreed as to what was meant by the request. It was decided that during the lunch recess, the Clerk would assemble the material and submit it to counsel for examination before sending them to the Jury (R Volume 22, page 4368). It was later learned that the exhibits were delivered to the Jury contrary to the foregoing (R Volume 22, page 4377).

The Jury requested the "transfer" from Credit Finance Corporation to Credit Realty Corporation containing a forged signature. There was no proof that any document contained a forgery. There was no transfer from Credit

FINANCE CORPORATION to CREDIT REALTY CORPORATION. The District Attorney and the Clerk assumed that the Jury wanted the Certificate of Incorporation of CREDIT REALTY CORPORATION, Government's Exhibit 4.

In addition, the Jury requested signature cards of all bank accounts of "related corporations". Over objection and contrary to the agreement for examination prior to submission, the bank records of INTER CITY FINANCE COMPANY, MAJOR MOTORS, NATIONAL CREDIT CORPORATION and CREDIT REALTY CORPORATION were sent to the Jury room (Government's Exhibit's 201, 202, 204, 205, 206, 207 and 208).

The manner in which these requests were handled was tantamount to the Court telling the Jury that in his opinion these were the exhibits asked for and constituted prejudicial error.

III.

The Court Erred in Charging The Jury And In Refusing To Charge The Jury As Requested By Defense Counsel.

Each of the appellants adopted the requested instructions of ROBERT B. ROBERTS (R Volume 21, page 4112). Each adopted the others' exceptions to the instructions (R Volume 21, page 4112).

The appellants hereby adopt the brief of ROBERT B. ROBERTS as argument hereunder (BR pages 19 through 38).

In addition to the foregoing, the Court instructed the Jury that the appellants were charged with the offense of interstate transportation of promissory notes (R. Volume 22, pages 4291 and 4296). Exception was taken to this charge (R. Volume 22, page 4342). It is error to instruct the Jury on law wholly inapplicable to the case.

The Court correctly stated that the Government had the burden of proving its case to the exclusion of a reasonable

doubt, however, the Court also instructed the Jury that the Grand Jury having returned the indictment found that there was sufficient evidence to convict the defendants if they did not come forward with proof (R Volume 21, page 4299).

It is error to give conflicting instructions, although one is correct and the other incorrect, and it is error to leave with the Jury the impression that it is the burden of the defendant to prove his innocence. *Perez* v. *United States,* 297 F. 2d, 12 (C.A. 5, 1961)

IV.

Errors Committed By The Court During The Course Of The Trial.

The appellants adopt the brief of ROBERT B. ROBERTS as it relates to this Specification of Error (BR pages 38 through 46).

Supplementing subpoint 6, page 42, of ROBERT B. ROBERTS' brief relating to misconduct by the prosecutor and the Court, the following is also submitted:

a. On June 18, 1962, DAVID CLARK, Court-appointed counsel for the appellant, GRENE, filed a Motion to Produce (Docket Entries).

b. The Motion to Produce was denied in open Court on July 10, 1962 (Docket Entries and R Volume 17, page 3412).

c. The fact that CLARK's Motion to Produce was directed to the records of SECURITY GUARANTY CORPORATION was brought out by the United States Attorney (R Volume 21, page 4058).

It was prejudicial misconduct for the prosecutor to argue to the Jury that no such motion had been filed. This was erroneously substantiated by the Court when he agreed with the District Attorney and further stated that he had not

denied any such motion (R Volume 22, pages 4269 and 4270). The prosecutor then argued that defense counsel had impugned the integrity of the Court.

The defendants' Motions for Mistrial were denied (R. Volume 22, pages 4277, 4280 and 4281) and the Court refused to give the Jury any reasonable explanation of the dispute (R. Volume 22, page 4340).

By challenging the integrity, sincerity and honesty of defense counsel, all in the presence of the Jury, the prosecutor and the Court committed reversible error. *Wagner* v. *United States,* 263 F. 2d, 877 (C.A. 5, 1959)

The prosecutor suppressed material evidence.

Threaded throughout the trial was the elusive, but ever present SECURITY GUARANTY CORPORATION. For example:

a. Prospectus and contracts of SECURITY GUARANTY (R Volume 12, pages 2256 through 2299).

b. SECURITY GUARANTY took over CREDIT FINANCE CORPORATION (R. Volume 9, page 1697).

c. CALLAHAN's charts (Exhibits 238-238E) and his testimony (R. Volumes 18, 19 and 20, pages 3435 through 4014).

d. Innumerable other witnesses referring to SECURITY GUARANTY CORPORATION.

The record reflects that defense counsel, CLARK, was examining the records of SECURITY GUARANTY COMPANY when they suddenly became unavailable; hence his Motion to Produce (R Volume 6, page 1039 and Volume 21, pages 4050 through 4056).

After the trial progressed, the imperative need for these records become more apparent. To the dismay and chagrin of the defendants, it was learned that these records were removed to the trunk of the automobile of the Post Office Inspector, FRANCIS, who had earlier been introduced to the Jury as being one of the officials who would assist in the

prosecution (R. Volume 4, page 700). (Little did the defendants think that his assistance would be to secrete material evidence.) This situation was met with complete disdain by the prosecutor and total indifference by the Court (R Volume 19, pages 3782 through 3787 and Volume 20, pages 3899 through 3901).

A prosecutor has the affirmative duty to disclose all the facts, regardless of the consequences. *United States* v. *Zborowski,* 271 F. 2d, 661 (C.A. 2, 1959) In the case of *United States* v. *Consolidated Laundries Corporation,* 291 F. 2d, 563 (C.A. 2, 1961) the Court ruled that the negligent suppression of evidence that might be a benefit to the defense requires a reversal.

The reprehensible action by the United States Attorney was neither an oversight nor a negligent omission, but the deliberate and conscious effort to win without justice. *Berger* v. *United States,* 295 U.S. 78 (1935)

Errors relating to charts.

Over objection of counsel, charts were introduced through Security Exchange Commission Accountant, GEORGE M. CALLAHAN (R Volume 18, pages 3481 through 3502, Exhibits 238-238c). These charts, duplicated and enlarged, were received in to evidence over objection. The blown up charts were placed upon an easel before the Jury.

As this Court said in *Lloyd* v. *United States,* 226 F. 2d, 9 (1955):

> "The use of this type evidence, however, has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a trial by charts, however, impressive, the array produced."

The footnoted conclusionary statements at the bottom (Government's Exhibit 238, the balance sheet) is precisely what this Court meant in the LLOYD case. Not only were the statements conclusionary, but also they contained statements of alleged facts not supported by the record, but as a result of independent investigation by the Security Exchange Commission.

For example, the stock of INVESTORS DEVELOPMENT CORPORATION was eliminated as an asset because:

a. The transfer agent's records (not before the Court) did not reflect stock in the name of CREDIT FINANCE CORPORATION (Footnote D, Government's Exhibit 238).

b. LEONARD GLAZER's letter relating to the stock (not before the Court) (R Volume 19, page 3744).

c. LEO HIRSHMAN's testimony (not in evidence) .(R. Volume 19, page 3749).

Another chart, "Summary of Case Transactions With or For Norman Gradsky, B. J. Gradsky, their family and Related Corporations", (Government's Exhibit 238B) contains no notations as to the source of the information placed on the chart. It was an arbitrary assumption on the part of the agent to include the corporations listed therein as "related corporations". At least one of the corporations, FRED ABLON MOTORS, was never mentioned during the entire trial.

These charts are typical of that which was condemned by LLOYDS vs. UNITED STATES supra. It was an abuse of discretion to permit these charts into evidence and constituted prejudicial error by the trial court.

V.

The Court Erred In Denying B. J. Gradsky's Motion For Judgment Of Acquittal.

In addition to being an authorized signatory on innumerable bank accounts, signing her name on checks and

other documents, and receiving a rug for her home from funds derived from CREDIT FINANCE CORPORATION, the record is void of any knowledge and participation by B. J. GRADSKY.

It appears that on one occasion she was present at a time when MR. GIBBONS and MR. ROBERTS were conducting an interview with a prospective investor. She did not participate in the conversation. The record is vague as to whether or not she overheard the entire conversation (R Volume 11, pages 2227 through 2231). One other witness testified that he spoke to a woman who "looked like Mrs. Gradsky", but when asked if he knew who Mrs. Gradsky is, the witness stated, "No, I only know her from seeing Mrs. Gradsky here and having her pointed out by other people in the lobby." (R Volume 12, page 2362)

It is submitted that the foregoing is insufficient in law to have submitted the case of Mrs. Gradsky to the Jury, and it was error for the trial Court to have denied her Motion for Judgment of Acquittal. (R Volume 21, page 4068)

The appellant, B. J. GRADSKY, hereby adopts the case citations submitted in the brief of ROBERT B. ROBERTS (BR pages 46 through 56).

VI.

It Was Abuse Of Discretion To Deny A Continuance To The Appellant, Robert Grene.

The Docket Entries show that as of October 18, 1961, the appellant, ROBERT GRENE, was represented by DAN CHAPPEL. DAN CHAPPEL'S Motion to Withdraw as GRENE'S counsel was granted on June 11, 1962 (R Volume 1, page 28 through 35). MR. GRENE'S inability to cope with the situation is demonstrated by the colloquy contained in the foregoing pages and by additional conversation with the Court (R Volume 1, pages 59 through 62). On the same

day at approximately ten minutes to 2:00 P.M., DAVID CLARK was notified of his appointment to represent this appellant (R Volume 1, page 88). His Motion for a Continuance was denied (R Volume 1, page 89). From the number of pages intervening, it appears that within another five minutes, the Court commenced empanneling the Jury (R Volume 1, page 97). On June 13, 1962, after the Jury was empanneled, but not sworn, MR. CLARK renewed his Motion for Continuance, which was denied (R Volume 3, pages 604 and 605).

Requiring Court-appointed counsel to commence a five week trial on approximately fifteen minutes notice constituted denial of due process and the right to assistance of counsel. Such action by the Trial Court was an abuse of discretion.

The appellants hereby adopt the Specification of Errors submitted by other appellants and incorporate by reference argument thereunder.

CONCLUSION

It is respectfully submitted:

a. That this cause should be reversed and remanded with directions to enter a Judgment of Acquittal on behalf of B. J. GRADSKY.

b. That this cause should be reversed and remanded for a new trial for NORMAN GRADSKY and ROBERT GRENE.

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E. David Rosen
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Miami, Florida

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants.*

v.

UNITED STATES OF AMERICA, *Appellee.*

ON CONSIDERATION OF THE APPLICATION of the appellant George Levine in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant George Levine to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 9, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 9, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 9, 1965 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE,
Chief Judge.

Dated: (ORIGINAL FILED APRIL 19, 1965)

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants.*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Florida
(APRIL 9, 1965)

On Petitions for Rehearing

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM:

It is ORDERED that the petitions for rehearing filed by appellants Hogue, Roberts, Norman Gradsky, B. J. Gradsky, Robert Grene and Levine, be, and the same is, hereby DENIED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1964

No. 19974

NORMAN GRADSKY, GEORGE LEVINE, HOWARD W. MEADORS, GERTRUDE HOGUE, B. J. GRADSKY, ROBERT B. ROBERTS, ALFRED SCHIFF, ROBERT GRENE, LEONARD L. GLASER and E. E. GIBBONS, *Appellants.*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for The Southern District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments are affirmed as to all of the appellants except Roberts, Schiff and Gibbons; the judgment against Roberts is affirmed as to the sentences imposed on counts three, six, eight and ten; the sentences against Roberts on counts one, two, four, five, seven and nine are set aside; the judgment against Schiff is affirmed as to the sentences imposed on counts two, eight, nine and ten; the sentences against Schiff on counts one, three, four, five, six and seven are set aside; the judgment against Gibbons is affirmed as to the sentences on counts

six and ten; the sentences against Gibbons on counts one, two, three, four, five, seven, eight and nine are set aside; and that this cause be, and it is hereby remanded to the said District Court for further proceeding not inconsistent with the opinion and judgment of this Court.

March 11, 1965

Issued as Mandate:

APPENDIX I

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless or a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Title 15, United States Code, Annotated, Section 77q(a), Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18, United States Code Annotated, Section 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the

person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

Title 18, United States Code Annotated, Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $20,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Rule 24, paragraph (b), Federal Rules of Criminal Procedure. Trial Jurors

(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.